Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

HARLOW CORPORATION,
Petitioner,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR
and NINA HATFIELD, ACTING DIRECTOR,
BUREAU OF LAND MANAGEMENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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April 24, 2003

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QUESTIONS PRESENTED FOR REVIEW

The regulatory policies and processes of the Department of the Interior (DOI) and Bureau of Land Management (BLM) for administration of the public land and mining laws, including the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 30 U.S.C.§ 28f-k, fail to distinguish valid existing mining claims with valuable mineral discoveries and unperfected mining claims. As a result, Fifth Amendment due process protections are not extended to valid existing unpatented mining claim property rights established under the 1872 General Mining Laws as amended, 30 U.S.C. § 22 et seq.

1. Are valid existing mining claim property rights protected by the Fifth Amendment from summary DOI, BLM and Department of Agriculture Forest Service processes which diminish and terminate valid existing mining rights?

2. Did DOI fee payment and forfeiture administrative processes give timely and clear notice meeting Fifth Amendment due process requirements to mining claim owners?

3. Should "valid existing rights" be the proper equitable estoppel criteria to be applied by the DOI in mining claim cases?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The Petitioner, Harlow Corporation was the Plaintiff-Appellant in the District of Columbia Court of Appeals proceedings.

There is no parent or publicly held company owning 10% or more of Harlow Corporation's stock.

Gale Norton, Secretary of the Interior who was substituted for Bruce Babbitt in the District of Columbia District Court proceedings, and Kathleen Clarke, Director, Bureau of Land Management were the Defendant-Appellees in the District of Columbia Court of Appeals proceedings.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW ii

APPENDICES iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 13

A. Forfeiture and Restriction of Valid Mining Clams With Valuable Mineral Discoveries Violates the Fifth Amendment

B. Mining Claim Owners Did Not Receive Timely and Clear Fifth Amendment Notice of the Omnibus Act's Fee Payment and Fee Waiver Requirements

C. Valid Existing Rights Should Be the Controlling Equitable Estoppel Criteria in Mining Claim Cases

CONCLUSION 30

APPENDICES

Opinion of the United States Court of Appeals for the District of Columbia ..... App. A

Opinion, Order and Judgment of the United States District Court for the District of Columbia ..... App. B

Decision of the United States Department of the Interior, Interior Board of Land Appeals ..... App. C

Constitutional Provisions, Statutes and Regulations ..... App. D

Miscellaneous ..... App. E

TABLE OF AUTHORITIES

Cases

Andrus v. Shell Oil Co., Colo., 446 US 657 (1980) 21

Best v. Humboldt Placer Mining Co., 371 US 334,(1963) . 21

Cameron v. United States, 252 US 450, (1920) 19, 21

Forbes v. Gacey, C.C. Nev. 1877, Fed. Cas. No. 4, 924, affirmed 94 US 762 21

Harlow Corporation, 135 IBLA 382 ..... 9, 20, 26

Hodel v. Irving, 481 US 704, (1987) 25

Independence Mining Company v. Babbitt, 885 F.Sup. 1356 (D. Nev 1995), aff'd, 105 F.3d 502 (9th Cir. 1997) 9

Lucas v. South Carolina Coastal Council, 505 US 1003, (1992) 22

Penn Central Transp. Co. v. New York City, 438 US 104, (1978) 22

Texaco, Inc. v. Short, 454 US 516 (1982) 24-27

The Stearns Co., Ltd., v. United States, 53 Fed. Cl. 446, (2002) 22

United States v. Coleman, 390 US 599, (1968) 21

United States v. Locke, 471 US 84, (1985) 17, 22-26, 29

Constitution

Article II § 2 of the United States Constitution 2

Article III § 2 of the United States Constitution 28

Fifth Amendment 11, 13, 15, 19-26

Statutes

5 U.S.C. §§ 701-706 2

Administrative Procedure Act, 5 U.S.C. § 706(1)(2)(A)(B) . 19

APA, 5 U.S.C. §§ 706-708 2

28 U.S.C. § 241 19

28 U.S.C. § 1254(1) 2

28 U.S.C. §§ 1291 and 2106 2

28 U.S.C. §§1331, 1631, 2201 2

30 U.S.C. § 22 ..... 1, 3, 4, 21

30 U.S.C. § 26. ..... 3, 5

30 U.S.C. § 28. 4

30 U.S.C.§ 28(d) 12

30 U.S.C. § 28f 12, 27

30 U.S.C. § 29. . . . . 4, 17

30 U.S.C. § 35 . . . . . 4, 15, 17

30 U.S.C. § 612. . . . . 4, 5, 23

30 U.S.C. § 613. 5

43 U.S.C. 1744 . . . . . 6, 10, 22, 24

Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-381, 106 Stat. 1374 . . . . . 3, 7

Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, 43 U.S.C.§1744 2

Minerals Policy Act, 30 U.S.C. § 21a 20

Omnibus Budget Reconciliation Act (Omnibus Act) Pub. L. 103-66, 107 Stat. 312, 43 U.S.C. § 28f-k 7, 11, 21

Omnibus Budget Reconciliation Act of 1993 (Omnibus Act), Pub. L. No. 103-66, 107 Stat. 312, 30 U.S.C. § 28f-k 3

Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 30 U.S.C.§ 28f-k 1

Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) 21

United States Mining Laws, 30 U.S.C. §§ 21a to 29, 35, 612, 613 2

Regulations

36 CFR §228 ..... 3, 5, 22

36 CFR § 251.82 5

43 CFR § 4.400. ..... 4, 6, 7

43 CFR §§ 4.410, 451-2 3

43 CFR § 4.420. 4

43 CFR § 3809 ..... 5, 6, 22

43 CFR § 3833. ..... 6, 10, 11

43 CFR § 3833.2. 10

Secretarial Orders

Secretarial Order No. 3163 of March 2, 1993. ..... 3, 8, 17, 22

IN THE SUPREME COURT OF THE UNITED STATES

HARLOW CORPORATION, Petitioner

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR and NINA HATFIELD, ACTING DIRECTOR, BUREAU OF LAND MANAGEMENT, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Harlow Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia, entered in the above-entitled proceeding on January 24, 2003.

OPINIONS BELOW

The Judgment of the Court of Appeals for the District of Columbia is reprinted in Appendix A.

The unreported Memorandum Opinion of the District Court for the District of Columbia is reprinted in Appendix B.

The Decision of the Department of the Interior Board of Land Appeals, Harlow Corporation, 135 IBLA 382 is reprinted in Appendix C.

JURISDICTION

The Petitioners filed suit in the District Court of the District of Oregon on June 25, 1996, pursuant to 28 U.S.C. §§1331, 1631, 2201 and 5 U.S.C. §§ 701-706, for review of the decision of the Department of the Interior Board of Land Appeals decision decided June 7, 1996 affirming BLM Alaska State Office decisions declaring Harlow Corporation's four mining claims forfeited.

The matter was removed to the District Court of the District of Columbia by transfer order on February 18, 1997.

On July 24, 2001, the District Court of the District of Columbia granted the Government's motion for summary judgment and issued it's Final Order and Judgment.

On September 18, 2001, Harlow Corporation filed its Notice of Appeal to the Court of Appeals of the District of Columbia Circuit, pursuant to 28 U.S.C. §§ 1291 and 2106 and Article II § 2 of the United States Constitution.

On January 24, 2003, the Court of Appeals for the District of Columbia Circuit issued a Judgment ordering that the District Court's grant of summary judgment to the Secretary of the Interior be affirmed.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment Due Process Clause; APA, 5 U.S.C. §§ 706-708; the United States Mining Laws, 30 U.S.C. §§ 21a to 29, 35, 612, 613; Federal Land Policy and

Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, 43 U.S.C.§1744; Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Omnibus Budget Reconciliation Act of 1993 (Omnibus Act), Pub. L. No. 103-66, 107 Stat. 312, 30 U.S.C. § 28f-k; Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996); Omnibus Consolidated and Emergency Applications Act of 1998, Pub. L. No. 105-277; Department of Agriculture, Forest Service regulations, 36 CFR §§228; 251, DOI regulations, 43 CFR §§ 4.410, 451-2; DOI BLM regulations, §§ 3809, 3833; Secretary of the Interior Secretarial Order 3163 of March 2, 1993.

STATEMENT OF THE CASE

1872 MINING CLAIM PROPERTY RIGHTS

Authority conferred by the 1872 General Mining Laws 30 U.S.C. § 22 et seq., as amended, enables citizens to enter and prospect on federal lands open to mineral location and, upon discovery of valuable minerals, to locate unpatented mining claims.

To establish, hold, conduct mining operations and patent mining claims, mining claim owners must locate and actively maintain mining claims under a number of federal and state laws.

"Discovery" of a mineral deposit, followed by the minimal procedures required to formally "locate" the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 U.S.C. § 26. As long as $100 of assessment work is performed annually, the individual may continue to extract and sell minerals from the claim without

paying any royalty to the United States, 30 U.S.C. § 28.

DEPARTMENT OF THE INTERIOR JURISDICTION AND DUE PROCESSES FOR DETERMINING MINING CLAIM VALIDITY

For over 100 years, the Secretary of the Interior has had primary jurisdiction to determine mining claim validity under the 1872 General Mining Laws, 30 U.S.C. § 22 et seq. This jurisdiction includes determining whether mining claims have been properly located under the federal and state mining laws and perfected with valuable mineral discoveries under DOI rules for mineral patent and other mining claim validity purposes. 30 U.S.C. § § 29, 35.

Hearing procedures afford parties in cases involving contested questions of fact to have a hearing and determination by an administrative law judge as to the sufficiency of mining claim locations and the discovery of valuable minerals. 43 CFR § 4.420.

Appeal procedures afford parties adversely affected by mining claim validity decisions of the BLM or of an administrative law judge to appeal to the Interior Board of Land Appeals (IBLA), 43 CFR § 4.400.

MINING LAW AMENDMENTS AFFECTING MINING CLAIM PROPERTY RIGHTS — 1955 LIMITATIONS ON MINING CLAIM SURFACE RIGHTS

In 1955, Congress established United States rights thereafter to manage and dispose of vegetative surface resources on unpatented mining claims located after the date of the Act (July 23, 1955). 30 U.S.C. § 612.

The 1955 Act provides a process for publication, filing of verified statements and hearings to determine the validity and effectiveness of any prior right or title to, or interest in or under such mining claims. 30 U.S.C. § 613.

1974 FOREST SERVICE AND 1980 BUREAU OF LAND MANAGEMENT REGULATION OF MINING CLAIM OPERATIONS AND ACCESS AFFECTING MINING CLAIM PROPERTY RIGHTS

In 1974, the Department of Agriculture issued Forest Service regulations, 36 CFR § 228, requiring mining claim owners and operators to file notices of intent for planned mining operations and to file plans of operations for operations that exceed defined surface resource impacts. 39 FR 32029, Sept. 4, 1974.

In 1980, the DOI issued the first BLM regulations, 43 CFR § 3809, requiring the filing of notices for planned mining operations with further requirements to file plans of operations that exceed defined surface resource impacts. 45 FR 82934, Dec. 17, 1980.

A valid mineral location and an exposure of a valuable locatable mineral discovery establishes rights to disturb surface resources and to remove minerals for a profit. 30 U.S.C. 26. The Forest Service and BLM, under their respective plan of operations mining claim regulations, provide mining claim operating conditions to minimize environmental impacts and surface resource destruction until issuance of patents. 30 U.S.C. § 612.

Forest Service regulations, 36 CFR § 251.82, provide an appeal process for appeal of written plan of operations

decisions of Forest Service line officers through Forest Supervisors to the Regional Foresters. BLM regulations, 43 CFR § 3809, provide appeals rights to State Directors and then to the IBLA.

1976 MINING CLAIM RECORDATION WITHOUT A PROCESS FOR DETERMINING PRIOR PERFECTED MINING CLAIMS AND FORFEITURE DISTINCTIONS

In 1976, Congress enacted the FLPMA, 43 U.S.C. 1744, and BLM regulations, 43 CFR § 3833. The Act and regulations set an automatic annual December 31 forfeiture deadline for unpatented mining claim owners to file annual assessment work or notice of intention instruments with the BLM.

FLPMA did not include a hearing process for mining claim owners to assert, and for the Government to recognize, perfected valid existing rights. The process made no distinction between forfeiture of perfected valid existing mining claims on reserved lands that could not be relocated, as opposed to perfected or unperfected mining claims on unreserved lands that could be relocated.

Parties owning mining claims that were adversely affected by BLM forfeiture decisions were provided appeal rights to the IBLA. 43 CFR § 4.400.

1992 $100 ANNUAL RENTAL FEE PAYMENTS WITH FEE WAIVER OPTION, WITHOUT A PROCESS FOR DETERMINING PRIOR PERFECTED MINING CLAIMS AND FORFEITURE DISTINCTIONS

On October 5, 1992, Congress enacted the Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 102-381, 106 Stat. 1374 30 U.S.C. § 28f-k.

The Act was a combination $100 rental fee payment and fee waiver filing forfeiture statute. An explicit, statutory forfeiture deadline of August 31 was set for paying rental fees or filing qualified fee waivers for the 1992 and 1993 assessment years, provided owners performed mining claim assessment work and filed proof of assessment work in compliance with FLPMA.

The Act did not include a hearing process for mining claim owners to assert, and for the Government to recognize, perfected valid existing rights. The process made no distinction between forfeiture of perfected valid existing mining claims on reserved lands that could not be relocated, and perfected or unperfected mining claims on unreserved lands that could be relocated.

Parties owning mining claims that were adversely affected by BLM forfeiture decisions were provided appeal rights to the IBLA. 43 CFR § 4.400.

1993 $100 ANNUAL MAINTENANCE FEE PAYMENTS WITH FEE WAIVER OPTION, WITHOUT A PROCESS FOR DETERMINING PRIOR PERFECTED MINING CLAIMS AND FORFEITURE DISTINCTIONS

On August 10, 1993, Congress enacted the Omnibus Budget Reconciliation Act (Omnibus Act) Pub. L. 103-66, 107 Stat. 312, 43 U.S.C. § 28f-k. The Act replaced the 1992 rental fee statute. The 1993 Omnibus Act repeated the 1992

statute's August 31 rental fee forfeiture deadline for paying a $100 maintenance fee per mining claim. No forfeiture deadline was set for filing fee waivers.

The Act did not include a hearing process for mining claim owners to assert, and for the Government to recognize, perfected valid existing rights. The process made no distinction between forfeiture of perfected valid existing mining claims on reserved lands that could not be relocated, and perfected or unperfected mining claims on unreserved lands that could be relocated.

On August 30, 1994, Secretary of the Interior Bruce Babbitt issued amended BLM regulations to implement the Omnibus Act. The Secretary set August 31 as the regulatory annual forfeiture deadline for filing fee waivers. The only legal notice received by mining claim owners of the Omnibus Act and BLM regulation requirements and deadlines was enactment of the Act and publication of the regulations in the Federal Register.

Parties owning mining claims that were adversely affected by BLM forfeiture decisions were provided appeal rights to the IBLA. 43 CFR § 4.400.

PATENT RIGHTS MORATORIUM

On March 2, 1993, Secretary of the Interior Bruce Babbitt issued Secretarial Order No. 3163, suspending first-step processing and publication of mining claim applications for mineral patents. (App. D-10).

At the same time, Secretary Babbitt delayed second-step approval of final certificates for the issuance of patents. The Secretary only issued patents upon federal court order.

Independence Mining Company v. Babbitt, 885 F.Sup. 1356 (D. Nev 1995), aff'd, 105 F.3d 502 (9th Cir. 1997).

In 1994, Congress enacted a moratorium on filing of applications for mineral patents. Department of the Interior and Related Agencies Appropriations Act of September 30, 1994, P.L. 103-332, 108 Stat 2499 §112. In 1996, Congress extended the moratorium. Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

ADMINISTRATIVE DUE PROCESS

The DOI relied on the Omnibus Act, the BLM regulations and media releases to provide notice of the Act's requirements and forfeiture deadline.

No administrative notice, billing or supplemental information processes were used to inform mining claim owners of the Omnibus Act's forfeiture statute and its complex interrelationship with the operation of the mining laws and FLPMA.

EQUITABLE ESTOPPEL

IBLA adopted equitable estoppel rules that bar mining claim owners equitable relief unless they are able to prove that affirmative misconduct of an official or employee was the reason that equitable relief is necessary. In the absence of any misrepresentation or concealment of a material fact, IBLA held that no basis existed for affirmative misconduct upon which a claim of estoppel could be based. *Harlow Corporation, supra*, 135 IBLA 382, at 387-388.

Except where equitable relief was given to owners of

forfeited claims located on reserved lands, summary forfeiture terminated all on-going operations and mining claim owners lost valuable mineral discoveries and investments.

HARLOW'S MINING CLAIMS AND MINING OPERATIONS

In 1988, preparatory to filing application for mineral patents and commencing mining operations, Harlow Corporation participated in a validity Forest Service examination of the mining claims. The Forest Service has never released the results of this examination. (App.E-9).

On August 4, 1993, Harlow paid $800 for 1992-1993 rental fees under the 1992 Act, and on July 28, 1994 paid an additional $400 for 1994 maintenance fees under the 1993 Omnibus Act and regulations, 43 CFR 3833. The payments were transmitted by letters in which Harlow inquired about forms and filing requirements. (App.E-10).

On May 3, 1994, Harlow filed a plan of operations and went to Alaska with a crew in late August and early September, 1995 to prepare the site and participate in a scheduled Forest Service validity examination. (App.E-10).

Harlow had invested over $100,000 to acquire the mining claims, to maintain mining rights and to expose and develop discoveries of valuable minerals on the mining claims. (App.E-10).

Harlow did not pay maintenance fees or file a certification for waiver of fees before August 31, 1995. (App.E-10). Instead, on December 27, 1995, Harlow filed an annual assessment work instrument to comply with FLPMA, 43 U.S.C. § 1744, and annual filing requirements. 43 CFR §

3833.2. At that time, Harlow also filed a certification for waiver of fees to meet the fee waiver requirements of the Omnibus Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 30 U.S.C. § 28f-k and BLM regulations. (App.E-10).

On June 11, 1996, after receiving a BLM decision declaring the mining claims forfeited and filing an appeal, Harlow submitted $800 to pay for the maintenance fees for 1996 and 1997 assessment years. These actions showed Harlow's willingness to pay the fees in the event that the certification for waiver of fees was rejected.

BLM, IBLA AND FEDERAL COURT ACTIONS
BLM DECISIONS

On February 12, 1996, the BLM Anchorage State Office issued two decisions deeming Harlow's mining claims abandoned and void (i.e., forfeited) for failure to pay 1996 maintenance fees or to file a waiver of payment on or before August 31, 1995, pursuant to the Act of August 10, 1993, Pub. L. 103-66, 107 Stat. 495, and the regulation in 43 CFR § 3833. (App.C-2,3).

IBLA DECISION

On June 7, 1996, IBLA denied Harlow's appeal and affirmed the Alaska State Office decision. IBLA rejected Harlow's claim that BLM's failure to provide notice of the $100 maintenance fee and fee waiver deadline and forfeiture provisions of the Omnibus Act of August 10, 1993, and regulations at 43 CFR § 3833, constituted a deprivation of property rights contrary to the Fifth Amendment. (App.C-7-9).

Instead, IBLA held that the 1993 Omnibus Act and

BLM regulations provided adequate notice to Harlow without BLM providing individualized notice of the Omnibus Act's requirements and deadlines. IBLA held that Harlow's prior payment under the Omnibus Act evidenced knowledge of its existence and need to inquire about its requirements. (App.C-7,9).

Harlow's equitable estoppel claim was rejected as lacking evidence showing affirmative misconduct on the part of BLM officials and employees. Harlow's 1994 letter submitting $100 per claim fee payments was ruled to be a vague inquiry which clearly did not require a response. (App. C-10,11).

DISTRICT COURT DECISION

On July 24, 2001, the District Court for the District of Columbia issued a Memorandum Opinion upholding the IBLA decision affirming forfeiture of Harlow's mining claims, pursuant to 30 U.S.C. § 28f, et seq., and BLM regulations as not being arbitrary and capricious. (App.B-10-11).

The District Court held that the DOI regulatory August 31 deadline for filing certifications was a permissible interpretation establishing a regulatory deadline of August 31 for filing certifications for waiver of fees, even though it was a filing deadline completely omitted from the 1993 Omnibus Act, 30 U.S.C.§ 28(d). (App.B-8-10).

The court held that Harlow's July 28, 1994 letter transmitting $100 maintenance fees, "indicates that plaintiff knew of the existence of the Omnibus Act and the BLM regulations and of their need to inquire into (their) demands." (App.B-6-7).

The District Court denied Harlow's equitable estoppel claims based on an interpretation that Harlow's 1993 and 1994 letters transmitting fees were not inquiries that merited BLM response and that there was no reliance by Harlow upon BLM's failure to respond. (App.B-11).

COURT OF APPEALS DECISION

On January 24, 2003, the Court of Appeals for the District of Columbia Circuit, in a unpublished decision, filed a Judgement affirming the District Court opinion and rejected Harlow's equitable estoppel contention as not showing intentional misconduct on the government's part and being without merit. (App.A-1-3).

REASONS FOR GRANTING THE WRIT

The Court of Appeals ruling in this case endorsed DOI policies and administrative processes for forfeiture of mining claims under the Omnibus Act, and restriction of mining claim rights under other laws, without protection of valid existing rights.

This case provides urgent need for this Court to establish Fifth Amendment constitutional protection to prevent unnecessary and unconstitutional loss of valid existing rights. The rulings sought by Petitioner would protect valid existing rights in Petitioner's mining claims and any of the approximately 200,000 unpatented mining claims recorded with BLM containing valuable mineral discoveries. Table 3-22. Adjudication of Mining Claims Pub. L. 94-579 from October 21, 1976, through Fiscal Year 2001. USDI,

BLM Public Land Statistics 2001.[1] (App.E-7).

The DOI has made no pretense of its policies and efforts to reform the 1872 General Mining Laws through any administrative action that summarily limits and terminates mining claim rights. Several processes pertinent to this case are utilized by the DOI and Department of Agriculture to withhold constitutional property rights and protections accorded to valid existing mining claims. These processes bring agency actions in direct conflict with the Constitution.

The guidelines advocated by Petitioner would restore constitutional property protections in all statutory and regulatory proceedings affecting valid mining claims having valuable mineral discoveries.

Federal agencies request Congress to enact many laws. In requesting legislation, an agency may not focus Congressional attention upon the operation of the law which impacts both perfected valid existing rights and unperfected rights. The agency may fail to request due process provisions to protect valid existing rights. If Congress enacts laws without processes for recognition of valid existing rights, an agency may assert that there is no requirement for the agency to provide administrative processes for recognition and protection of valid existing rights.

The Omnibus Act's $100 annual maintenance fee payment and fee waiver option and automatic forfeiture operations illustrate this strategy. The Omnibus Act made no distinction for valid existing rights. Relying upon the

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1. Not in the record of this case – presented for this Court's consideration of the current circumstances.

Omnibus Act, the DOI takes the position that there is no need for administrative processes to determine and accommodate valid existing rights and no need to provide timely and clear notice of the Act's forfeiture requirements under Fifth Amendment property standards.

Results of the DOI's administration of the Omnibus Act have been striking. Harlow's mining claims and hundreds of thousands of other mining claims, some of which contained valuable minerals discoveries, were summarily forfeited by operation of the Omnibus Act. Of one million active mining claims recorded with the BLM under the FLPMA at the end of Fiscal Year 1993, all but 306,650 active mining claims had been forfeited by the end of Fiscal Year 1995. Tables 53 for 1993 and Table 3-19 for 1995. Recordation of mining claims, Public Law 94-579, from October 21, 1976. USDI, BLM Public Land Statistics 1993 and 1996. (App.E-10).

Forest Service and BLM plans of operations for regulating mining claim surface uses in effect diminish and summarily terminate valid mining claim existing rights.

In 1988, the Forest Service conducted a mining claim validity examination of Harlow Corporation's mining claims, preparatory to Harlow's commencement of mining operations and filing of an application for mineral patent under the mining laws, 30 U.S.C. § 35. (App.E-9). The Forest Service exercised its discretion and withheld results of the examination for the next five years.

In 1994, Harlow filed a new plan of operations with the hope of obtaining Forest Service approval in order to commence mining operations and to file application for mineral patent. The Forest Service scheduled an examination at the earliest time convenient to Harlow. During August and

September 1995, Harlow participated in the second Forest Service validity examination of the mining claims. Harlow was not informed of the results of this examination.

Discretionary authority of Forest Service and BLM officials to approve plans of operation gives these officials almost unfettered *de facto* control of mining claim rights to mine and remove minerals and patent mining claims. As more stringent access, land use and environmental standards are required, approving officials are given broader discretion to increase mining costs. Profits are reduced without regard to the effects in terminating valid existing rights.

Mining claim owners face economic and other uncertainties with plan of operation requirements that affect stability of mining operations. Valid existing rights can be readily diminished or terminated based upon the unregulated whim of officials and employees. Approval of plans of operations can be withheld indefinitely while mineral validity is being determined or for environmental considerations.

Plan of operations requirements may make mining operations impossible. Restrictions may be made on the mode of access based on the level of ongoing mining operations, and the level of mining operations may be restricted based on the mode of existing access. Restrictions for rare natural resources and endangered wildlife may be imposed without evidence of their existence. Administrative appeal and court review processes do not provide timely or cost-feasible alternatives for commercial mining decision making, operations and investments.

The legal dilemma presented by use of plans of operation to regulate and restrict mining operations for valid existing mining claims has gained Congressional attention.

"The struggle that has occurred with respect to the 3809 Regulations provides another example of administrative efforts to alter the requirements applicable to mining claims located under the 1872 Mining Law. The same pattern of parrying back and forth between DOI and Congress seen above occurred with respect to this issue." Randy Hubbard, "The 1872 Mining Law: Past, Present and Future?" Natural Resources & Environment, ABA Section of Environment, Energy, and Resources, page 183-184, Vol, 17, No. 3, Winter 2003.

Applications for mineral patents under the mining laws, 30 U.S.C. §§ 29 and 35, provided an avenue to escape unpatented mining claim forfeiture and regulatory surface restrictions that terminate or diminish mining claim rights. *United States v. Locke*, 471 US 84, 107 (1985). (The miners in *Locke* could have fully protected their interests against the effect of the statute by taking the minimal additional steps of patenting their claims.).

Rights to file applications for minerals patents were terminated almost 10 years ago when Secretary of the Interior Bruce Babbitt issued Secretarial Order No. 3163, March 2, 1993. (App.D-10). Later, in 1996, Congress enacted a moratorium on filing applications for mineral patents. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

Secretary Babbitt's moratorium order indefinitely suspending filing and processing of mineral patent applications resulted in lawsuits and Congressional attention.

> "The order resulted in a de facto moratorium on the issuance of mineral patents, and led to several lawsuits. It also established a pattern that has repeated itself throughout the 1990s, where DOI would take an administrative action restricting the rights of mining claimants, and Congress would react to those restrictions." Randy Hubbard, The 1872 Mining Law:Past, Present and Future?" Natural Resources & Environment, ABA Section of Environment, Energy, and Resources, page 151, Vol, 17, No. 3, Winter 2003.

Restoring protections for valid existing mining rights would remedy other problems with the administration and adjudication of the federal land and mining laws.

DOI, BLM and Forest Service officials and employees would end unprofessional adjudication, payment billing, notice and information practices. The present agency practices do not befit agencies with long histories of honorable service to the public and citizens doing business with the agencies.

IBLA and the District Court's excuse for BLM's failure to respond to Petitioner's requests for information in 1993 and in 1994 concerning the Omnibus Act conflicted with well-established Government standards. Harlow's inquiries showed misunderstanding of the essential requirements needed to avoid forfeiture of its valuable mining claims.

The mining laws and Constitution never anticipated that at some future time a Secretary of the Interior would initiate policies, processes and practices that would summarily terminate valid existing rights rather than validate and give effect to such rights.

> "By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron v. United States*, 252 US 450, 460 (1920).

Actions of the DOI, BLM and the Forest Service employees that have failed to give effect to valid existing rights are clearly unlawful and arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with constitutional right. Such actions should be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(1)(2)(A)(B).

On the one hand, citizens have been invited by the United States mining laws to enter available public lands to establish valid existing rights to locate, mine, remove and patent valuable minerals. The DOI is entrusted with responsibility to promote and protect these rights. On the other hand, the DOI has instituted an all-out program to cut off mining rights. Such a pattern and practice is tantamount to conspiracy to deprive citizens of their rights — actions which are prohibited under 28 U.S.C. § 241.

Unless valid existing rights are restored, all mining claims may now be summarily taken without Fifth Amendment due process protection. Examination of all of the relevant BLM and Forest Service mining claim actions reveal cumulative regulatory diminishment of valid existing mining claim rights to mine and remove minerals to such an extent

that mining profits may no longer be possible.

The DOI also completely ignores valid existing rights as an important factor in providing equitable relief to owners of forfeited mining claims that cannot be relocated. Presently, the DOI requires persons to prove that affirmative misconduct on the part of an official or employee caused mining claim forfeiture. *Harlow Corporation, supra,* 135 IBLA 387-388. (App.C-10-11).

Replacing the present equitable estoppel criteria with the requirement for owners to assert and prove valid existing rights will help balance DOI policies with the policies underlying the rights granted by the 1872 Mining Laws and Fifth Amendment due process guarantees which implicate mining claim property rights.

Petitioner has prepared a short outline of issues and subject matter that will be covered in Petitioner's brief in the event that this Court decides to accept this Petition.

FORFEITURE AND RESTRICTION OF VALID MINING CLAIMS WITH VALUABLE MINERAL DISCOVERIES VIOLATES THE FIFTH AMENDMENT

If this Petition is granted on this issue, Petitioner's brief will analyze:

1. The national importance under the Minerals Policy Act, 30 U.S.C. § 21a, for the Secretary of the Interior to provide regulations which do not disrupt the economic stability of large and small mining enterprises by restricting and taking valid existing mining claim rights.

2. Pertinent statutes and cases establishing historic and

current statutory and constitutional property rights conferred by the 1872 General Mining Laws, as amended, 30 U.S.C. § 22 et seq., to mine and remove minerals and for patenting valid existing mining claims with valuable mineral discoveries. Beginning with *Forbes v. Gacey*, C.C. Nev. 1877, Fed. Cas. No. 4, 924, affirmed 94 US 762, 766-767, the concept of valid existing rights, including state taxation and lien filing against valuable mining claims that have not been patented, still survives to the present day.

DOI authority to determine valid existing rights based on a discovery of valuable minerals which establish rights in unpatented mining claims to mine, remove and patent mining claims upon discovery of valuable minerals. *Cameron v. United States, supra*, 252 US at 459; *Best v. Humboldt Placer Mining Co,*. 371 US 334, 335-336 (1963); *United States v. Coleman*, 390 US 599, 602 (1968). "They are property in the fullest sense of the word, and their ownership, transfer and use are governed by well-defined code or codes of law" *Forbes v. Gacey, supra*, at 767. Discoveries must exist at the time of location and at the time of determination. *Andrus v. Shell Oil Co., Colo.*, 446 US 657 (1980).

3. Fifth Amendment conflicts raised by multiple statutes, BLM and Forest Service regulations and administrative processes that operate to restrict and summarily forfeit valid existing rights.[2]

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2. The 1976 Federal Land Policy and Management Act, 43 U.S.C. § 1744, Department of the Interior and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-381, 106 Stat. 1374, Omnibus Budget Reconciliation Act, 30 U.S.C. 28f-k, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996);

4. The policy conflict between regulation of mining claim rights into extinction and the Fifth Amendment prohibition against taking private property without just compensation. This Court has ruled that the filing requirements and forfeiture provisions of the 1976 FLPMA, 43 U.S.C. § 1744, met due process standards and constituted reasonable regulation of economic interests that may adversely affect mining claims. *United States v. Locke, supra*, 471 US at 105.

Petitioner's brief will examine the relevant circumstances and extent to which DOI, BLM and Forest Service actions diminish and terminate valid existing rights under Fifth Amendment takings criteria. *Penn Central Transp. Co. v. New York City*, 438 US 104, 124. (1978). While mitigation of public harm is an important consideration in takings cases, *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1018 (1992), discretion given to the Secretary under SMCRA may deny permission for operations based upon a whole new set of criteria. *The Stearns Co., Ltd., v. United States*, 53 Fed. Cl. 446, 453 (2002).

Petitioner's brief will demonstrate that while this Court in *United States v. Locke*, *supra*, 471 at 105, intended to allow Congress latitude in regulating property rights, there are limitations. The 1985 *Locke* case did not contemplate that the Omnibus Act would overlap FLPMA's filing and forfeiture requirements. The *Locke* holding did not foresee, nor did it account for, the 1993 indefinite moratorium on applications for mineral patents.

Forest Service mining claim regulations 36 CFR § 228, Bureau of Land Management surface management regulations 43 CFR § 3809 and Secretarial Order No. 3163.

Locke did not anticipate progressive BLM and Forest Service limitations and restrictions on mining and removal rights authorized under the 1872 Mining Laws and the Act of July 23, 1955, 30 U.S.C. 612. Most significantly, this Court in *Locke* did not anticipate that the DOI would use discretionary authority to administer the mining laws with summary administrative processes that diminish and terminate valid existing rights without Fifth Amendment due process.

5. Petitioner's brief will examine administrative processes that would enable owners of mining claims adversely affected in BLM and Forest Service proceedings to assert and to show entitlement to due process protection of valid existing rights.

Petitioner's brief will illustrate that where miners cannot relocate perfected mining claims, in lieu of an appeal, BLM forfeiture notices could easily inform miners of requirements to assert valid existing rights and processes for determination of the validity of the assertion.

MINING CLAIM OWNERS DID NOT RECEIVE TIMELY AND CLEAR FIFTH AMENDMENT NOTICE OF THE OMNIBUS ACT'S FEE PAYMENT AND FEE WAIVER REQUIREMENTS

If this Petition is granted on this notice issue, Petitioner's brief will analyze:

1. Fifth Amendment procedural due process property guarantees for perfected mining claims with valuable mineral discoveries and for unperfected mining claims without mineral discoveries. The purpose of FLPMA was to eliminate stale or dead mining claims that are not recorded. The Omnibus Act summarily extinguishes active mining claims which are

carried on the BLM records, some of which are valid existing rights and many of which are being worked under BLM and Forest Service plans of operations.

Remedies will be examined that are available to owners of mining claims to relocate forfeited mining claims located on federal lands open to mining that are not available to owners of mining claims that cannot be relocated.

2. Fifth Amendment forfeiture time deadline and clarity notice requirements for forfeiture statutes such as FLPMA, 43 U.S.C. 1744, interpreted by this Court in *United States v. Locke*, *supra*, 471 US at 108-109. The two-year Indiana mineral interest lapse statute considered in *Texaco, Inc. v. Short, supra* 454 US 516, serve as an illustration:

> "In this case, the 2-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Texaco, Inc. v. Short*, *supra* at 532.

This Court has held that three years is sufficient for a United States mining claim forfeiture statute, under the Fifth Amendment notice requirements:

> "Here, there can be no doubt that the Act's recording provisions meet these minimal requirements. Although FLPMA was enacted in 1976, owners of existing claims, such as

> appellees, were not required to make an initial recording until October 1979. This 3-year period, during which individuals could become familiar with the requirements of the new law, surpasses the 2-year grace period we upheld in the context of a similar regulation of mineral interests in*Texaco*. Moreover, the specific annual filing obligation at issue in this case is not triggered until the year after which the claim is recorded initially; thus, every claimant in appellees' position already has filed once before the annual filing obligations come due". *United States v. Locke*, *supra* 471 US at 108.

Contrastingly, a federal Indian heirship succession forfeiture statute that became effective the day it was signed into law is manifestly insufficient. *Hodel v. Irving*, 481 US 704, 733 (1987).

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The clarity and sufficiency of the Omnibus Act for providing Fifth Amendment notice to mining claim owners will be critically analyzed.

The Omnibus Act omits a deadline for filing fee waivers. The issuance of DOI's BLM regulations on August 30, 1994 established an August 31, 1994 through 1998 annual regulatory forfeiture deadline for filing fee waivers. Petitioner's mining claims were declared forfeited for failure to meet the complex and confusing regulatory requirements one-year later, in 1995.

Petitioner will critically analyze the applicability of the *Locke* case presumption that a prior filing under a Congressional Act shows knowledge of the Act's (here the Omnibus Act's) alternative fee payment or fee waiver

certification requirements. *United States v. Locke*, 471 US at 108. *Harlow Corporation, supra*, 135 IBLA 386. f.n. 5/.

> "That these claimants already have made one filing under the Act indicates that they know, or must be presumed to know, of the existence of the Act and of their need to inquire into its demands. The requirement of an annual filing thus was not so unlikely to come to the attention of those in the position of appellees as to render unconstitutional the notice provided by the 3-year grace period." *United States v. Locke*, 471 US 108-109.

In *Locke*, a prior timely annual filing had been made by the claimant, indicating his knowledge of the Act's annual filing requirements. In this case, Harlow had paid rental and Omnibus Act maintenance fee payments and was attempting to file a new and distinct instrument - a fee waiver certification - to comply with the Omnibus Act. (App.E-1-4).

Fifth Amendment notice contemplates that forfeiture statutes will provide plain and clear understanding of requirements to persons owning property affected by the statutes. The Fifth Amendment imposes no duty on United States citizens doing business with a federal agency to employ an attorney to gain an understanding of agency regulatory requirements that are supposed to be plain and clear.

The Omnibus Act presents property forfeiture notice complexities that were not present in either the *Locke* or *Texaco* cases. In the *Texaco* case the forfeiture statute established easily-understandable, relatively simple filing deadlines:

> "As a result, this is not a case in which individual notice of a statutory change must be given because a statute is sufficiently unusual in character, and triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations." *United States v. Locke*, *supra*, 471 US at 109 f.n. 16.

The Omnibus Act and BLM regulations contain a confusing, conflated combination of fee payment and fee waiver filing requirements that operate in conjunction with the 1872 Mining Act and FLPMA annual mining claim filing requirements.

To some extent, the notice deficiencies in the Omnibus Act are revealed by statistics. About seven-hundred thousand of one-million mining claims were forfeited within two years after the Act was signed. An indication of the Omnibus Act's complexity in determining its sufficiency is the enactment of 1998 Pub. L. 105-277, Oct. 21 1998, 121 Stat. 2081 amending the fee payment provisions of 30 U.S.C. § 28f, following this amendment, BLM issued maintenance fee waiver certification Form 3830-2, United States Department of the Interior Bureau of Land Management (February 2003), Form Approved OMB No. 1004-0114.[3] (App.D-11-13).

The statutory amendments and form clarified the fee waiver filing requirements of the Omnibus Act and BLM

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3. This form was not included in the record in this case. The form is offered to this Court to show the complexity of waiver requirements.

regulations. Obviously, the amendments and the form were required because the fee and waiver filing requirements were unclear.

Yet another factor is that the Omnibus Act involves the collection of fees payable to the United States. There are Government requirements and standards for administrative processes - such as billing statements - to collect recurring fees payable to the United States. DOI's compliance with the standards will be examined.

Agency responses to requests for information becomes an important part of the notice and fiscal collection process. The Petitioner was willing to pay or file a fee waiver and requested further information to understand how to do business with the DOI and BLM. This was information that should be made available to every citizen and particularly persons doing business with the agency. The DOI held that one of Petitioner's inquiries was vague. Petitioner made two requests for information with payments and received nothing in return. (App.E-1-4).

VALID EXISTING RIGHTS SHOULD BE THE CONTROLLING EQUITABLE ESTOPPEL CRITERIA IN MINING CLAIM CASES

Petitioner will not challenge DOI IBLA authority to apply equitable estoppel principles in mining claim cases, even though Section 2, Article III of the Constitution extends Judicial Power to all cases in Law and Equity arising under the Constitution and the Laws of the United States.

Although no statutory authority can be found providing the Secretary of the DOI with jurisdiction in equity cases, it is apparent that mining claim owners can receive convenient and

low-cost equitable relief by the DOI in mining claim cases, provided the correct valid existing rights criteria is applied.

If this Petition is granted on the equitable estoppel issue, Petitioner's brief will analyze:

1. Balancing the policies of the DOI for forfeiture and diminishment of valid existing rights against statutory and constitutional policies for protection of valid existing rights. The economic loss of forfeited valuable mineral deposits, profits and investmen s will be weighed in with the policies against forfeiture of valid existing rights:

> *** we have never held that the Government can extinguish a vested property interest that has been legally held and actively maintained for more than 20 years merely because the private owners relied on advice from agency personnel concerning a poorly worded statutory deadline and consequently missed a filing deadline by one day.*** Justice O'Connor, Concurring, *United States v. Locke*, *supra*, at 112.

2. Other estoppel considerations, such as processes for persons to assert and the Government to determine valid existing rights; requirement or entitlement, in consideration of fees paid, to receive recurring annual notice of filing or payment deadlines for maintenance fees or fee waivers; requirements to answer requests for information and the consequences of BLM's failure to provide information.

CONCLUSION

Granting this Petition for writ of certiorari will serve constitutional, public and commercial interests.

Respectfully submitted,

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Dated: April 24, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5326 September Term 2002

HARLOW CORPORATION, Civil Action No. 97-0320
Plaintiff,
v. Filed: Jan 24, 2003

GALE NORTON, Secretary
of the Interior, AND Nina
Hatfield, Acting Director,
Bureau of Land Management,
Appellees

Appeal from the United States District Court
for the District of Columbia

Before: HENDERSON, RANDOLPH and GARLAND, Circuit Judges.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. It is

ORDERED that the district court's grant of summary judgment to the Secretary of the Interior be affirmed. Upon considering the regulations implementing the Omnibus Budget Reconciliation Act under the standards *of Chevron U.S.A., Inc. v. Natural Res. Defendant. Council*, Inc., 467 U.S. 837 (1984), we conclude that the August 31 deadline for the filing of the

small miner waiver certification is reasonable.[1] We thus further conclude that the forfeiture of Harlow's unpatented mining claims for failure to pay the $100 per claim maintenance fee did not deprive Harlow of its property without due process of law. *See United States v. Locke*, 471 U.S. 84, 108 (1985). Harlow's equitable estoppel contention is without merit and, accordingly, we reject it. *See ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearsing en banc. *See* Fed. R. App. P 41(b); D.C. Dir. Rule 41.

PER CURIAM

FOR THE COURT

/s/ Mark J. Langer, Clerk

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1. The Bureau of Land Management has since changed the filing deadline from August 31 to September 1 to coincide with the beginning of the assessment year. Location, Recording, and Maintenance of Mining Claims or Sites, 64 Fed. Reg. 47,018 (August 27,1999)(codified at 43 C.F.R. § 3833.1-7(d)).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5326

September Term 2002
97cv00320

Harlow Corporation, A Delaware Corporation and All Other Owners of Unpatented Mining Claims Similarly Situated
Appellant,

v.

Gale Norton, Secretary of the Interior, and Nina Hatfield, Acting Director, Bureau of Land Management,
Appellees

Filed On:
March 19, 2003

ORDER

Upon consideration of appellees' bill or costs, it is

ORDERED that appellees' request for costs be granted. Costs are awarded to Gale A. Norton, et al., in the amount of $105.18 and taxed against appellant.

Costs are payable directly between parties. Payment should not be submitted to the Clerk.

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Michael C. McGrail
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARLOW CORPORATION, Plaintiff,	)	
v.	)	Civil Action No. 97-0320 (RWR)
GALE NORTON, Secretary of the Interior, et al., Defendants.	)	

MEMORANDUM OPINION

Plaintiff Harlow Corporation ("Harlow") filed this lawsuit challenging the forfeiture of its mining claims located on public lands within the Tongass National Forest in Alaska. The claims were forfeited pursuant to the Omnibus Budget Reconciliation Act ("Omnibus Act"), 30 U.S.C. §28f, *et seq.*, and the supporting regulations adopted by the Bureau of Land Management ("BLM"). Plaintiff and defendants have both moved for summary judgment. Because the regulations are neither arbitrary nor capricious, and because they serve the purpose of the Omnibus Act, plaintiff's challenge to those regulations fails. Because the decision by the Interior Board of Land Appeals ("IBLA") upholding the forfeiture of plaintiff's claims pursuant to the regulations was not arbitrary and capricious, plaintiff's challenge to the IBLA decision also fails. Defendants are entitled to summary judgment on plaintiff's complaint.

BACKGROUND

In 1987, plaintiff acquired four unpatented mining claims known as the Dave's Dream placer mining claims. The

claims are located in the Tongass National Forest of Alaska in an area designated as the Stikine-LeConte Wilderness Area. Designated wilderness areas are not open to mining operations except those with valid existing rights as of midnight on December 31, 1983. Because the Dave's Dream claims were recorded with the BLM in 1982 and 1983, they were permitted to continue operation in the wilderness area.

In 1993, the Interior and Related Agencies Appropriations Act ("Appropriations Act") required persons with unpatented mining claims to pay a rental fee of $100 per claim. Claim holders were required to pay the $100 rental fee for both 1993 and 1994 by August 31, 1993. Plaintiff paid the required rental fees for 1993 and 1994 by the August 31, 1993 deadline.

Congress then enacted the Omnibus Act, effective August 10, 1003, requiring claim holders to pay a $100 per claim maintenance fee by "August 31 of each year, for years 1994 through 1998." 30 U.S.C. § 28f (Supp. 1997). The Omnibus Act also provided that "[f]ailure to pay the claim maintenance fee...as required by sections 28f to 28k of this title shall conclusively constitute a forfeiture of the unpatented mining claim,...and the claim shall be deemed null and void by operation of law." 30 U.S.C. § 28i. Claim holders with ten or fewer claims could obtain a waiver of the maintenance fee requirement if they certified "in writing to the Secretary that on the date the payment was due" certain conditions were satisfied. 30 U.S.C. § 28f. By regulation, [1] the deadline for the waiver certification was August 31, the same day the maintenance fee was due. 43 C.F.R. § 3833.1-7(d).

The BLM published the proposed regulations

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1. The Omnibus Act provided that the "Secretary of the Interior shall promulgate rules and regulations to carry out the terms and conditions of sections 28f to 28k of this title as soon as practicable after August 10, 1993." 30 U.S.C. § 28k.

implementing the Omnibus Act's maintenance fee requirements on May 11, 1994m and published the final regulations on August 30, 1994.

Plaintiff paid the maintenance fee for each of its four claims on July 28, 1994, prior to the August 31, 1994 deadline. Plaintiff noted at that time that it was entitled to the waiver, but that it had "not made a filing for a waiver of rental fees or maintenance fees." See Letter dated July 28, 1994, Administrative Record ("A.R."), at 201.

Plaintiff did not, however, pay the maintenance fees or file a waiver certification by the August 31,.1995, deadline for the next year. Because the fees were not paid by the deadline, plaintiff's four claims were forfeited and deemed void.

In February 1996, the BLM issued a decision officially declaring plaintiff's four claims void for failure either to pay the maintenance fees or to file for a waiver by the August 31, 1995 deadline. See BLM Decision, A.R. at 45.

Plaintiff appealed the BLM decision to the IBLA. Plaintiff argued that the regulations were invalid because they did not provide prior notice to claim holders and because the Omnibus Act did not contain the August 31 deadline for waiver certifications. Plaintiff also argued that the BLM should be equitably estopped to enforce the forfeiture provisions against plaintiff. On June 7, 1996, the IBLA held that the regulations were valid and that plaintiff's situation did not support the application of equitable estoppel. See IBLA Decision, A.R. at 30-33.

On June 25, 1996, Plaintiff filed this lawsuit in the United States District Court for the District of Oregon. The case was subsequently transferred to this court.

DISCUSSION

I. Challenge to Regulations

Plaintiff argues that the BLM regulations are invalid because they failed to provide adequate notice to claim holders and because they were in excess of statutory authority. "When

as court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the statute does not clearly address the issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

A. INADEQUATE NOTICE

"Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, [courts] have recognized that these interests are a unique form of property. The United States, as owner of the underlying fee title to the public domain maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired." *United States v. Locke*, 471 U.S. 84, 103 (1985) (citing *Kleppe v. new Mexico*, 426 U.S. 529 (1976)).

"In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, tot he extent the statute regulates private conduct, affording those within the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements." *Locke*, 471 U.S. at 108; see also *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) (government provides due process if it affords "the citizenry a reasonable opportunity to familiarize itself with [the regulations'] terms and to comply."

Plaintiff alleges that the Omnibus Act and the BLM's regulations failed to satisfy the requirements of due process

because they did not give claim holders individualized notice that either the maintenance fee or the waiver certification must be filed by August 31 or the claims would be forfeited. Plaintiff's argument is not supported by the record in this case or by controlling legal authority.

Plaintiff is charged with knowledge of the Omnibus Act from the date of its enactment in August 1993 and is charged with knowledge of the regulations by virtue of the notice published in the Federal Register in May and August 1994. "Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge of hardship resulting from ignorance." *Jones v. United States*, 121 F.3d 1327, 1330 (9th Ci. 1997) (quoting *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667-68 (9th Cir. 1989)), *cert denied*, 523 U.S. 1121 (1998).

The period of time between the 1993 enactment of the Omnibus Act - - which contains the August 31 deadline for paying the maintenance fees and the provisions that failure to pay would result in forfeiture of the claims - - and the August 31, 1995 missed deadline, afforded affected claim holders a reasonable opportunity to familiarize themselves with, and to comply with, the new requirements imposed by the Omnibus Act and the regulations. *See id.* The regulations, first published in early May 1994, imposed the same August 31 deadline for the waiver certification to be filed. Claim holders who satisfied the criteria for a waiver had a reasonable opportunity to learn of and to comply with the simply procedure for filing a waiver certification.

The Omnibus Act had been in effect for more than a year, and claim holders had reason "to be alert to possible regulatory changes." *See id.* at 1331. If plaintiff, a corporation involved in the running of a major mining operation for many years, had any questions about the maintenance fee or the waiver requirements, it was incumbent upon plaintiff, "as it is upon other businessman, to have

checked the regulations or to have consulted an attorney for legal advice." *See Locke*, 471 U.S. at 95.

More damaging to plaintiff's argument that the regulations should be declared invalid because they failed to provide adequate notice is the undisputed fact that plaintiff had actual notice of the regulations at least one full year before the August 31, 1995 deadline. Plaintiff sent the BLM a check for $400 "to pay the $100.00 maintenance fee per claim for the September 1, 1994 thru August 31, 1995 year in lieu of assessment work." See Letter dated July 28, 1994, A.R. at 201. Plaintiff also wrote in that letter that it qualified "as a claimant who owns 10 or fewer claims [but that plaintiff has] not made a filing for waiver of rental fees or maintenance fees." *Id.* Paying the maintenance fee by the August 31, 1994 deadline and indicating knowledge of the waiver certifications provision indicates that plaintiff knew of the existence of the Omnibus Act and the BLM regulations "and of their need to inquire into [their] demands." *Locke*, 471 U.S. at 108.

Plaintiff argues that individual notice to each claim holder would have been a better method of implementing the maintenance fee requirements of the Omnibus Act. Plaintiffs

> may well be right that such an individualized notice scheme would be a sound means of administering the Act. But in the regulation of private property rights, the Constitution offers the courts no warrant to inquire into whether some other scheme might be more rational or desirable than the one chosen by Congress; as long as the legislative scheme is a rational way of reaching Congress' objectives, the efficacy of alternative routes is for Congress alone to consider.

Locke, 471 U.S. at 109. If the Act and the regulations approach rationally the goal of requiring claim holders to take

affirmative action to retain their claims, "{whether a [different notice scheme] would have been wiser or more practical under the circumstances is not a question of constitutional dimension." See *Locke*, 471 U.S. at 1090 citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19 (1976)).

Plaintiff also complains that it was not given the opportunity to pay the maintenance fee or to file for a waiver of the fee after the deadline had passed. "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *Locke*, 471 U.S. at 100-01. The judiciary is not "licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." *Locke*, 471 U.S. at 95 (citing *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 98 91981)). "A filing deadline cannot be complied with, substantially or otherwise, by filing late - - even by one day." *Locke*, 471 U.S. at 101.

The BLM regulations are "a reasonable, if severe, means of furthering the [Omnibus Act's] goals; sanctioning with loss of their claims those claimants who fail to file provides a powerful motivation to comply with the filing requirement, while automatic invalidation for noncompliance enables federal land managers to know with certainty and ease whether a claim is currently valid."[2] See *Locke*, 471 U.S. at

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2. Plaintiff argues that the regulations are inconsistent with the Omnibus Act's goal of collecting revenue because hundreds of thousands of claims were forfeited. Initially, the forfeiture provision in the Omnibus Act and the regulations further the goal of collecting revenue by prompting compliance with the maintenance fee payment requirement. Additionally, the collection of revenue was not the only goal of the Omnibus

106. Plaintiff's loss of their unpatented mining claims is a loss it

> could have avoided with minimal burden; it was [plaintiff's] failure to file on time - - not the action of Congress - - that caused the property right to be extinguished. Regulation of property rights does not "take" private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.

Locke, 471 U.S. at 107.

The Omnibus Act and the BLM regulations provided adequate notice to claim holders that they must either pay the 4100 per claim maintenance fee by August 31, 1995, or file for a waiver of the maintenance fee by the same deadline. Indeed, plaintiff had actual knowledge of these deadlines. The Omnibus Act and the BLM regulations also provided constitutionally adequate notice that a claim holder's failure to comply with the maintenance fee requirement by the August 31 deadline would result in the forfeiture of its claims.

B. IMPROPER DEADLINE FOR WAIVER CERTIFICATION

Plaintiff argues that the Omnibus Act did not establish August 31 as the deadline for filing waiver certifications and,

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Act or the federal mining laws. A separate, equally important, goal was to require affirmative action by claim holders, through the timely payment of minimal fees, in order to eliminate claims that were stale or worthless. See IBLA Decision, A.R. at 31-32.

therefore, the BLM regulation establishing this deadline should be declared invalid as exceeding statutory authority.[3] Congress has explicitly left a gap fort he agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 843-44. "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

Because Congress did not select a specific deadline for the filing for a waiver of the maintenance fee requirement, the issue before the Court is whether the date selected by the BLM is "a reasonable one." See Chevron, 467 U.S. at 845. The Omnibus Act requires that the application for a waiver certify that the claimant held not more than 10 mining claims on the date the maintenance fee is due. See 30 U.S.C. § 28f (d). It was reasonable for the BLM to chose the same deadline for the waiver applications as for the maintenance fee payments.

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3. Plaintiff also argues that the Omnibus Act does not provide for forfeiture of claims if a waiver certification is not filed by the deadline. The statute and the regulations are clear, however, that failing to file the waiver certification does not itself result in forfeiture. Instead, if there is no wavier, the maintenance fee is due by August 31 and it is the failure to pay the maintenance fee that results in forfeiture. As was the case in 1994 when plaintiff failed to request a waiver to which it may have been entitled, a claim holder who does not file the waiver certification by August 31 is not subject to forfeiture if it pays the maintenance fee by the August 31 deadline.

Indeed, selection of a later deadline for the waiver applications would bot be reasonable because, if the claim holder has no applied for a small miner waiver of the maintenance fee requirement and has not paid the maintenance fee by August 31, the claim would be forfeited. Any later-filed waiver certification could not properly be accepted for a claim that was already deemed void by operation of the Omnibus Act.

The BLM regulation imposing the August 31 deadline for waiver certifications is a reasonable implementation of the Omnibus Act, is consistent with the goals of the Omnibus Act and federal mining laws, and is not arbitrary and capricious. Plaintiff's challenge to the regulation is denied.

II. Challenge to IBLA Decision

The IBLA ruled that plaintiff had adequate notice of the maintenance fee and waiver deadlines and that individual notice to each claim holder was not required. See IBLA Decision, A.R. at 32. The IBLA also held that the regulation imposing an August 31 deadline for claim holders to file a waiver certification was reasonable. *Id.* at 30. Finding no false representation by the BLM, the IBLA rejected plaintiff's equitable estoppel argument. *Id.* at 32-33. Plaintiff challenges the IBLA decision, arguing that it was arbitrary and capricious.

Courts review agency determination in order to ascertain whether the agency has "'examined the relevant data and articulated a satisfactory explanation for its action.'" See, *Novicki v. Cook*, 946 F2d 938, 941 (D.C. Cir. 1991) (citing *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). A court should engage in a searching and carful review of agency action but should not attempt to substitute its own judgment for the judgment of the agency. See, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

"Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate

courts resolving legal questions." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996). "Like appellate courts, district courts do not duplicate agency fact-finding efforts. Instead, they address a predominantly legal issue: Did the agency 'articulate a rational connection between the facts found and the choice made.'" *Id.* (citing *Bowmna Transp., Inc. v. Arkansas-Best Freight Sus. Inc.*, 419 U.S. 281, 285 (1974)).

A. VALIDITY OF REGULATIONS

As is discussed above, the regulations were promulgated well within the BLM's statutory authority under the Omnibus Act and provided unpatented clam holders with constitutionally-adequate notice of the maintenance fee requirement and deadline. The regulations were a reasonable means of implementing the goals of the Omnibus Act and were not inconsistent with the goals of the federal mining laws. Consequently, the IBLA's proper rejection of plaintiff's argument that the regulations were invalid was not arbitrary and capricious.

B. EQUITABLE ESTOPPEL

Plaintiff argues that the BLM should be estopped to enforce the Omnibus Act and the regulations in this case. Assuming that equitable estoppel can properly be applied against the government, "its application to the government must be rigid and sparing." *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *Marinangeli v. Lehman*, 43 F. Supp. 2d 1, 10 (D.D.C. 1998). Equitable estoppel will be applied against the government only under the compelling circumstances, and only upon "proof of each of the traditional elements of the doctrine - - false representation was made, ignorance of the true facts by that party, and reliance, as well as...a showing of an injustice...and lack of undue damage to the public interest." Id. (quoting *International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536, 551 (D.C. Cir. 1983)).

Plaintiff has not presented evidence to support the relevant factors, and the circumstances in this case so not warrant the application of equitable estoppel. Plaintiff relies on the BLM's failure to respond to two letters, one date August 4, 1993, and the other dated July 28, 1994. In the 1993 letter, plaintiff writes, "If it is not necessary for us to pay this rental fee and we can maintain our claims with the filing of the Notice of Intent, would you please advise." See August 4, 1993 Letter, A.R. at 58. This letter, written before the effective date of the Omnibus Act and before the challenged regulations were promulgated, is irrelevant to the challenged regulation in this case.

The second letter accompanied plaintiff's payment of the first maintenance fee required under the Omnibus Act and the BLM regulations. The letter referenced the maintenance fee and the available waiver. Plaintiff then asked whether there was a form that it should be using to make the maintenance fee payments and whether there are any other requirements "in terms of filing or forms that we need to be fling with regard to maintaining our claims." See, July 28, 1994 Letter, A.R. at 201.

The letters do not support plaintiff's argument for equitable estoppel. In the first letter, plaintiff asked the BLM to advise if plaintiff was not required to pay the rental fee. Because plaintiff was required to pay the rental fee, no response for BLM was required. In the second letter, plaintiff asked if they needed to use a form to make the maintenance payment and, having already mentioned the maintenance fee payment and the waiver, whether there were any "other requirement in terms of filing or forms" for maintaining a claim. Because no specific form was needed, and because there was no "other" related requirement beyond the timely payment of the maintenance fee or the timely submission of a waiver certification, no response to the second letter was needed.

The BLM's failure to respond to plaintiff's letters does not constitute a false representation. As is discussed above, plaintiff had actual knowledge of the proper maintenance fee and waiver requirements and, therefore, did not rely on the BLM's failure to respond to plaintiff's letters. There is no showing of injustice. Instead, there is only a showing that a corporation failed to comply with known deadlines and suffered the Congressionally-mandated consequences. The IBLA correctly rejected Plaintiff's argument for the application of equitable estoppel.

CONCLUSION

The BLM regulations adopted pursuant to the Omnibus Act are not arbitrary and capricious, and they are consistent with and in furtherance of the goals of the Omnibus Act. Plaintiff has not presented evidence which would support the application of equitable estoppel in this case, and the IBLA's decision upholding the regulations and declining to apply equitable estoppel was correct. Accordingly, summary judgment in favor of defendants is appropriate. A final order accompanies this Memorandum Opinion.

SIGNED this 23rd day of July, 2001.

/s/ Richard W. Roberts
United State District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARLOW CORPORATION, Plaintiff,	)	
v.	)	Civil Action No. 97-0320
	)	(RWR)
GALE NORTON, Secretary of the Interior, et al., Defendants.	)	

FINAL ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that plaintiff's Motion for Summary Judgment [24] be, and hereby is, DENIED. It is further

ORDERED that defendants' Motion for Summary Judgment [30] be, and hereby is GRANTED.

This is a final appellate order.

SIGNED this 23rd day of July, 2001.

/s/ Richard W. Roberts
United States District Judge

APPENDIX C

United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

HARLOW CORPORATION

IBLA 96-248 Decided June 7, 1996

Appeal from decisions of the Alaska State Office, Bureau of Land Management, declaring mining claims void for failure to file maintenance fees or waiver of payment on or before August 31, 1995. AA-50219 and AA50621 through AA-50623.

Affirmed as modified.

1. Mining Claims: Rental or Claim Maintenance Fees: Generally- -Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

   Pursuant to sec. 10101(d) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f(d) (1994), and the implementing regulation at 43 CFR 3833.1-7(d), an eligible mining claimant seeking a waiver of the annual mining claim maintenance fee shall file a certification of entitlement by Aug. 31. A decision declaring a mining claim to be forfeited is properly affirmed when claimant has failed to timely file either the required waiver certification or the annual maintenance

fee.

2. Mining Claims: Rental or Claim Maintenance Fees: Generally- - Mining Claims: Rental or Claim Maintenance Fees: Small Miner Exemption

A decision declaring a mining claim to be forfeited and void by operation of law under sec. 10101 of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f (1994), and the implementing regulations will be affirmed when a claimant has failed to timely file either the annual maintenance fee or a waiver certification by Aug. 31 regardless of the fact claimant was not given individual notice of the filing requirement prior to adjudication of the claim by BLM.

3. Estoppel

Affirmative misconduct is an essential element of a claim of estoppel against the Government. In the absence of any misrepresentation or concealment of material facts, there is no basis to find any affirmative misconduct upon which a claim of estoppel could be based.

APPEARANCES: Roger F. Dierking, Esq., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Harlow Corporation has appealed from separate decisions of the Alaska State Office, Bureau of Land Management (BLM), dated February 12, 1996, declaring the

Dave's Dream (AA-50219) and the Dave's Dream Nos. 2-4 mining claims (AA-50621 through AA-50623) void for failure to file maintenance fees or waiver of payment on or before the due date of August 31, 1995. No filing was received until January 10, 1996, when BLM received an affidavit of assessment work and a "small miners certification" dated December 27, 1995. Because no filing had been made by the August 31 deadline, BLM issued the decision from which this appeal was taken. Appellant filed a petition for a stay with the notice of appeal.

Because consideration of the stay request necessarily requires review of appellant's likelihood of success on the merits of the appeal and since appellant has raised issues involved in many similar appeals, we have resolved this appeal in an expedited decision on the merits.[1]

Pursuant to section 10101 of the Act of August 10, 1993, P.L. 103-66, 107 Stat. 405, the holder of an unpatented mining claim, mill or tunnel site is required to pay a claim maintenance fee of $100 per claim on or before August 31 of each year for years 1994 through 1998. 30 U.S.C. § 28f(a) (1994). Under section 10104 of the same statute, failure to pay the claim maintenance fee "shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law." 30 U.S.C. § 28i (1994).

Another section of this statute provides that "[t]he claim maintenance fee may be waived for a claimant who certifies * * * that on the date payment was due, the claimant

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1. The judges of this Board ordinarily endeavor to resolve assigned appeals to the extent practical in the sequence in which they were docketed.

and all related parties - - (A) held not more than 10 mining claims, mill sites, or tunnel sites, or combination thereof, on public lands; and (B) have performed assessment work required under the Mining Law of 1872." 30 U.S.C. § 28f(d)(1) (1994). The implementing regulation requires a claimant to file "a waiver certification on or before August 31 each year * * * to hold the claims each assessment year beginning at 12 o'clock noon on September 1 of the calendar year the certification is due, through August 31, 1998." 43 CFR 3833.1-7(d). Because appellant had not filed a certificate establishing its qualification for a waiver of the claim maintenance fee by August 31 as required by the quoted regulation, BLM determined that the claim maintenance fee had not ben filed as required by 30 U.S.C. § 28f(a) (1994) and held that the claim was forfeited under 30 U.S.C. §28i (1994).

It appears from the record that appellant paid the annual maintenance fee of $100 per claim for the assessment year from September 1, 1994, to September 1, 1995, by the statutory deadline of August 31, 1994, despite an assertion in the cover letter enclosing the check that appellant qualified for a wavier of fees. The record discloses that appellant also paid the mining claim rental fee of $100 per claim for each of the assessment years September 1, 1992, to September 1, 1993, and September 1, 1993, to September 1, 1994, before the statutory deadline of August 31, 1993.[2]

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2. These payments were made to comply with the requirements of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (1992 Act), P.L. 102-381, 106 Stat. 1374,1378-79 (1992). This predecessor statute required payment by the Aug. 31 deadline of a "rental fee" for each of the assessment years of $100 per unpatented mining claim (or $200 per claim for both assessment years).

As noted above, appellant failed to either pay the annual maintenance fees for the claims or file a certificate of qualification for waiver by the deadline of August 31, 1995. Rather, appellant filed an affidavit of assessment work for the four claims as well as a "maintenance fee waiver" on January 10, 1996. Consequently, BLM issued the decision finding the claims were deemed "abandoned" and declaring them void.[3]

In the statement of reasons for appeal, appellant challenges the validity of the statute as implemented in the regulations to the extent the regulations are applied to forfeit mining claims without prior notice from BLM and an

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3. To the extent that the BLM decision held that the failure to either pay the maintenance fee or file the waiver of payment by Aug. 31 constituted "abandonment" of the mining claims, it was applying terminology found in the 1992 Act as well as the mining claim recordation provisions of section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1994). Under the 1992 Act, failure to make the rental payment or (in the case of the holder of 10 or fewer claims) to file a certified statement in support of claimant's exemption from rental payment by Aug. 31, 1993, is deemed to "conclusively constitute and abandonment" of the claims. 106 Stat. 1378-79; 43 CFR 3833.1-5; 3833.1-7; 3833.4(a)(2) (1993). Similarly, under section 314(c) of FLPMA, the failure to timely file the required instruments "shall be deemed conclusively to constitute an abandonment" of the claims. 43 U.S.C. § 1744 (c) (1994).

Under the Act of Aug. 10, 1993, the failure to pay the claim maintenance fee "shall conclusively constitute a forfeiture" of the unpatented claim which "shall be deemed null and void by operation law." 30 U.S.C. § 28i (1994); see 30 CFR 3833.4(a)(2).

opportunity to submit a waiver certificate. This is asserted to constitute a deprivation of property rights without due process of law contrary to the fifth amendment to the Constitution. Appellant further contests the validity of the regulation establishing a deadline for filing a waiver certificate on the ground no deadline for filing the waiver certificate, as distinguished from the maintenance fee payment, is set by the statute. Further, appellant claims entitlement to equitable relief on the ground of estoppel.

[1] With respect to appellant's challenge of the deadline for the waiver documents found in the regulations, we note that the Board recently addressed this issue in depth in a decision cited as Alamo Ranch Co., 135 IBLA 61 (1996). Therein, we analyzed the validity of the regulation at 43 CFR 3833.4(a)(2) to the extent it provides that failure to file maintenance fee waiver documents by August 31 is conclusively presumed to constitute a forfeiture of the claim. Recognizing that terms of the statute itself did not expressly require a forfeiture of the claim for failure to file waiver documents by that deadline, we held:

> It is absolutely clear from the foregoing that Congress knowingly chose to grant the Secretary of the Interior the discretionary authority to provide for the waiver of required maintenance fees for those holding 10 or few claims if he deemed such a waiver desirable. In doing so, Congress necessarily vested in the Secretary broad authority to fashion rules implementing such a waiver system. The Secretary's discretionary authority to develop such rules is not constrained by any former procedures used to implement the Rental Fee legislation but rather is only constrained by such express limitations as are inherent in the

> legislative grant of authority. * * * Since Congress left it to the Secretary to determine if any waiver of the maintenance fee for small miners was to be allowed, the Secretary clearly has the authority to require, as a precondition for granting a waiver, that certification of qualifications for a waiver be filed as of a date certain, failing in which no waiver will be granted. This is essentially what 43 CFR 3833.1-7(d) provides. As this regulation has been promulgated pursuant to lawful authority, * * * this Board is required to enforce it according to its plain terms. [Footnotes omitted; emphasis in original.]

175 IBLA at 75. Since appellant failed to either pay the claim maintenance fee or file a waiver certification by August 31 as required by 43 CFR 3833.1-7(d), the claims are conclusively deemed to be forfeited. 43 CFR 3833.4(a)(2).

[2] With respect to appellant's challenge regarding the adequacy of notice, we have previously considered the same issue under 1992 Act and its implementing regulations. In Dee W. Alexander Estate, 131 IBLA 39 (1994), we noted that the language of the 1992 Act dealing with the consequences of the failure to make the annual payment of the claim rental fee is very similar to the language used by Congress is section 314 (c) of FLPMA, 43 U.S.C. § 1744 (c), which provides that the failure to record the notice of location of a mining claim, millsite or tunnel site with BLM or file evidence of annual assessment work or a notice of intention to hold "shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the

owner." [4]

As we noted in Alexander, the Supreme Court has upheld the constitutionality of section 314 of FLPMA, concluding that a mining claim for which timely filings are not made is extinguished by operation of law notwithstanding the claimant's intent to hold the claim. United States v. Locke, 471 U.S. 84, 97 (1985). "Regulation of property rights does not 'take' private property when an individuals's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." 471 U.S. at 107 (citations omitted). On the issue of the adequacy of notice to claimants, the Court reversed the District Court finding that individualized notice of the filing deadlines was constitutionally required and held:

> In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements. Texaco, [Inc. v. Short], 454 U.S. [516,] at 532. [Additional citations omitted.]

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4. See note 3, supra.

471 U.S. at 108.[5] In this context, when deciding Alexander we found the 1992 Act as implemented by BLM to be consistent with the constitutional requirements set forth in the Locke and Texaco cases. The constitutionality of the 1992 Act has also been upheld in Court against fifth amendment challenge. Kunkes v. United States, 32 Fed. Cl. 249 (Ct. Fed. Cl. 1994), aff'd, 78 F.3d 1549 (Fed. Cir. 1996). Finding "Congress retains the affirmative power to change the conditions for continued ownership of mineral claims, assuming that power is reasonably exercised," the Court further held that:

> Claimholders have always been subject to some ongoing proof of their interest in developing the mineral resources of their claims. Although the [1992] Act raised the ante, it did so in a way that cannot be considered substantially different in kind or degree from what had previously been required. It was plainly motivated by the same purpose, namely elimination of stale or worthless claims. H.R.Rep. No. 626, 102nd Cong., 2d Sess. 14 (1992). The Supreme Court has held that this is a legitimate governmental interest. Locke, 471 U.S. at 105-06. [Additional footnotes omitted]

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5. In rejecting the need for individualized notice to claim holders, the Court further noted that claimants, like appellant in the case presently before the Board, had already made a prior filing under the statute thus establishing their knowledge of its existence. United States v. Locke, 471 U.S. at 108.

32 Fed. Cl. at 254-55.[6] Although provisions of 30 U.S.C. §§ 28f and 28i (1994) vary in some particulars from the 1992 Act, the laws are sufficiently *pari materia* that they must be construed with reference to each other. Thus, we find the analysis in Kunkes and Alexander applicable to this case decided under 30 U.S.C. §§ 28f and 28i (1994). Accordingly, we find that individuals notice to appellant was not a prerequisite to adjudication of the claims resulting from the failure to either pay maintenance fees or file a waiver certificate by August 31.[7]

[3] Appellant also argues that BLM should be equitably estopped from finding the mining claims to be forfeited, citing the decision in United State v. Wharton, 514 F.2d 406 (9th Cir. 1975). This assertion

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6. On appeal, the Court noted:

> "It is entirely reasonable for Congress to require a $100 per claim fee in order to assess whether the claim holders believe that the value of the minerals in their claims is sufficiently great to warrant such a payment; and whether claim holders have the resources and desire to develop these claims. If the claims are not valued by the claim holders sufficiently to warrant a $100 fee payment, then the claim holders' decision not to pay the fee eliminates an unnecessary encumbrance on public lands and frees the land for a more valued use."

78 F.3d at 1556.

7. This analysis is particularly compelling in cases such as this where it is clear that the claimant had actual notice of the statute requiring annual filings.

is predicated in large part on the lack of any reply by BLM to appellant's letter of July 28, 1994, enclosing the rental fee for the previous year. Reference to that letter discloses no specific request for information which compelled a response.[8] Further, no misrepresentation of a material fact by BLM has been demonstrated. It is well established that the Government may be estopped only upon a showing of "affirmative misconduct," among other things. See Schweiker v. Hansen, 450 U.S. 785 (1980); Phelps v. Federal Emergency Management Administration, 785 F.2d 13 (1st Cir. 1986); Leland Q. Phelps, 134 IBLA 124 (1995). This case is distinguishable from Wharton where there was an affirmative misrepresentation as to the availability of the land and not merely a failure to advise a claimant. United States v. Wharton, supra at 410. In the absence of any misrepresentation or concealment of material facts, we are unable to find any affirmative misconduct upon which a claim of estoppel could be based. Leland Q. Phelps, supra at 131-32.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified and the petition for stay is denied as moot.

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8. Appellant's inquiries were vague and did not clearly require a response. Thus, appellant stated:

> "If there is a form that we should be using to make our maintenance fee payments we would appreciate receiving the forms for future filings.
>
> "If there is any other requirement in terms of filing or forms that we need to be filing with regard to maintaining our claims, we would appreciate your advising us of any such requirements."

/s/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Administrative Judge

I concur:

/s/ John H. Kelly
John H. Kelly
Administrative Judge

APPENDIX D

CONSTITUTIONAL PROVISIONS

AMENDMENT V

No person shall be... deprived of life, liberty, or property, without due process of law;

STATUTORY PROVISIONS

From the U.S. Code Online via GPO Access
[wais.access.gpo.gov] [Laws in effect as of January 2, 2001]
[Document not affected by Public Laws enacted between January 2, 2001 and January 28, 2002

5 U.S.C. § 706 To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C)in excess of statutory jurisdiction, authority, or limitations,

or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1331 The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

30 U.S.C § 22 Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 26 The locators of all mining locations madeon any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, ***** so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface *****

30 U.S.C. § 28 Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or improvements on claims pending issue of patent; co-owner's succession in interest upon delinquency in contributing proportion of expenditures; tunnel as lode expenditure ***** On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. ***** The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of September succeeding the date of location of such claim. *****

30 U.S.C. §28f(a) Claim maintenance fee. The holder of each unpatented mining claim, mill, or tunnel site, located pursuant to the mining laws of the United States, whether located before or after August 10, 1993, shall pay to the Secretary of the Interior, on or before September 1 of each year for years 1999 through 2001, a claim maintenance fee of $100 per claim or site. Such claim maintenance fee shall be in lieu of the assessment work requirement contained in the Mining Law of 1872 (30 U.S.C. 28-28e) \1\ and the related filing requirements contained in section 1744(a) and (c) of title 43

(b) Time of payment The claim maintenance fee payable pursuant to subsection (a) of this section for any assessment year shall be paid before the commencement of the assessment year, *****

CODIFICATION

Pub. L. 105–277, which directed the amendment of section 28f of title 30, United States Code, was executed by making the amendment to section 10101 of Pub. L. 103-66, which is classified to this section, to reflect the probable intent of Congress. See 1998 Amendment notes below

AMENDMENTS

1998 - Subsec. (a). Pub.L. 105-277 amended first sentence generally. Prior to amendment, first sentence read as follows: "The holder of each unpatented mining claim, mill, or tunnel site located pursuant to the mining laws of the United States before October 1, 1998 shall pay the Secretary of the Interior, on or before September 1, 1999 a claim maintenance fee of $100 per claim site." See Codification note above.

Pub. L. 105-240 substituted "The holder of each unpatented mining claim, mill, or tunnel site located pursuant to the mining laws of the United States before October 1, 1998 shall pay the Secretary of the Interior, on or before September 1, 1999 a claim maintenance fee of $100 per claim site." for "The holder of each unpatented mining claim, mill or tunnel site located pursuant to the Mining Laws of the United States, whether located before of after August 10, 1993, shall pay to the Secretary of the Interior, on or before August 31 of each year, for years 1994 through 1998, a claim maintenance fee of $100 per claim."

Subsec. (d)(3). Pub. L. 105-277 added par. (3). See Codification note above.

SIMILAR PROVISIONS

Similar provisions were contained in Pub. L. 102-381, title I, Oct. 5, 1992, 106 Stat. 1378, 1379.

(d) Waiver

(1) The claim maintenance fee required under this section may be waived for a claimant who certifies in writing to the Secretary that on the date the payment was due, the claimant and all related parties– *****

30 U.S.C. §35 Placer claims; entry and proceedings for patent under provisions applicable to vein or lode claims; conforming entry to legal subdivisions and surveys; limitation of claims; homestead entry of segregated agricultural land Claims usually called ``placers,'' including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, *****

30 U.S.C. § 612 (a) Prospecting, mining or processing operations Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.
(b) Reservations in the United States to use of the surface and surface resources Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). *****

30 U.S.C. § 613 Procedure for determining title uncertainties
(a) Notice to mining claimants; request; publication; service ***** any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as

to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim - *****

***** such failure shall be conclusively deemed

(i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and

(ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and

(c) Hearing

If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, *****

43 U.S.C. § 1744 ***** The owner of an unpatented lode or placer mining claim located after October 21, 1976 shall, prior to December 31 of each year following the calendar year in which the said claim was located, file the instruments required by paragraphs (1) and (2) of this subsection: (1) File for record in the office where the location notice or certificate is recorded either a notice of intention to hold the mining claim *****, an

affidavit of assessment work performed thereon ***** on a detailed report provided by section 28-1 of title 30, relating thereto. ***** (c) Failure to file as constituting abandonment; defective or untimely filing The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner;***** (Pub. L. 94-579, title III, Sec. 314, Oct. 21, 1976, 90 Stat. 2769.) Section Referred to in Other Sections This section is referred to in sections 1621, 1732 of this title; title 30 sections 28f, 28j, 188, 242.

REGULATORY PROVISIONS

Parks, Forests, and Public Property
Forest Service, Department of Agriculture

36 CFR Ch. .II (July 1, 1998 ed.)

36 CFR § 228.1 Purpose

It is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54), which confer a statutory right to enter upon the public lands to search for minerals, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

36 CFR § 251.82 Appealable decisions. (a) The rules of this subpart govern appeal of written decisions of Forest Service line officers related to issuance, denial, or administration of

the following written instruments to occupy and use National Forest System lands, including but not limited to: ***** (4) Mining plans of operation under 36 CFR part 228, subpart A.

36 CFR § 251.87 Levels of appeal

*****

(b) Decisions made By Forest Supervisors and Regional Foresters. Only one level of appeal is available on written decisions by Forest Service line officers below the level of the Chief and above the level of the District Ranger. The levels of available appeal are as follows:

(1) If the decision is made by a Forest Supervisor, the appeal is filed with the Regional Forester;

(2) If the decision is made by a Regional Forester, the appeal is filed with the Chief of the Forest Service.

(c) Decisions made by the District Ranger. Two levels of appeal are available for written decisions by District Rangers.

(1) The appeal for initial review is filed with the Forest Supervisor

(2) The appeal for a second level of review is filed with the Regional Forester within 15 days of the first level appeal decision.*****

Public Lands: Interior

43 CFR Subtitle B - (October 1, 2002 ed.)

43 CFR § 4.451.1 How initiated

The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim.

43 CFR § 4.451-2 Proceedings in Government contests.

The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests with the following exceptions: *****

43 CFR § 3809

DEPARTMENT OF THE INTERIOR Bureau of Land Management 43 CFR Parts 2090, 2200, 2710, 2740, 3800 and 9260 [WO-300-1990-00] RIN 1004-AD22 Mining Claims Under the General Mining Laws; Surface Management AGENCY: Bureau of Land Management, Interior. ACTION: Proposed rule; proposed suspension of rules. ---------- SUMMARY: The Bureau of Land Management (BLM) proposes to suspend final regulations published on November 21, 2000, that amended the rules governing mining operations involving metallic and some other minerals on public lands. A suspension would provide the BLM an opportunity to review some of the new requirements in light of issues plaintiffs raise in four lawsuits challenging the rules and in light of issues the Governor of Nevada and others have raised since the final rules were published. BLM has concerns about substantial policy and legal issues raised in the lawsuits and wants to resolve such concerns before implementing a new regulatory program. To avoid a regulatory vacuum that would result from a suspension, BLM proposes to republish and reinstate as a final rule the rules that were in place on January 19, 2001, the day before the revised rules became effective. [Federal Register: March 23, 2001 (Volume 66, Number 57)] [Proposed Rules] [Page 16162-16171] From the Federal Register Online via GPO Access [wais.access.gpo.gov] [DOCID:fr23mr01-35]

43 CFR § 3809.1 What are the purposes of this subpart?

Authority: 16 U.S.C. 1280; 30 U.S.C. 22; 30 U.S.C. 612; 43 U.S.C. 1201; and 43 U.S.C. 1732, 1733, 1740, 1781, and 1782. Source: 65 FR 70112, Nov. 21, 2000, unless otherwise noted. General Information The purposes of this subpart are to: (a) Prevent unnecessary or undue degradation of public lands by operations authorized by the mining laws. Anyone intending to develop mineral resources on the public lands must prevent unnecessary or undue degradation of the land and reclaim disturbed areas. This subpart establishes procedures and standards to ensure that operators and mining claimants meet this responsibility; and (b) Provide for maximum possible coordination with appropriate State agencies to avoid duplication and to ensure that operators prevent unnecessary or undue degradation of public lands.

43 CFR §3809.1-4 Plan of operations: when required. An approved plan of operations is required prior to commencing: (a) Operations which exceed the disturbance level (5 acres) described in Sec. 3809.1-3 of this title. ****

43 CFR §3809.4 Appeals. (a) Any operator adversely affected by a decision of the authorized officer made pursuant to the provisions of this subpart shall have a right of appeal to the State Director, and thereafter to the Board of Land Appeals, Office of Hearings and Appeals, pursuant to part 4 of this title, if the State Director's decision is adverse to the appellant. ***** The decision of the State Director, when adverse to the appellant, may be appealed to the Board of Land Appeals, Office of Hearings and Appeals, pursuant to part 4 of this title.

43 CFR 3833. 1-7 Filing requirements for the maintenance fee waiver and other exceptions. *****. (d) Each small miner shall file a waiver certification on or before September 1 each

year to hold the claims each assessment year beginning at 12 o'clock noon on September 1 of the calendar year the certification is due, through September 1, 2004. ***** [59 FR 44861, Aug. 30, 1994; 59 FR 47815, Sept. 19, 1994, as amended at 64 FR 47022, August 27, 1999; 67 FR 38206, June 3, 2002] [[Page 799]]

43 CFR § 3833.4 Failure to file, or to pay maintenance or location fees. (a)(1) The failure to make annual filings required by Secs. 3833.2-1 and 3833.2-2 on or before the December 30 immediately following the September 1 by which the small miner filed for a waiver of payment of the maintenance fee, shall conclusively constitute a forfeiture of the mining claim or site. (2) ***** , or failure to pay the maintenance or location fees required by Secs. 3833.1-4,3833.1-5, and 3833.1-7, or failure to file the documents required by Sec. 3833.1-7 (b) through (d) within the time periods prescribed therein for claimants who also fail to pay the maintenance fee, shall be deemed conclusively to constitute a forfeiture of the mining claim, mill site, or tunnel site.*****

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WASHINGTON, D.C. 20240

June 2, 1997

IN REPLY TO
1203/3860 (32

EMS TRANSMISSION 6/4/97
Instruction Memorandum No. 97-133
Expires: 09/30/98
To: All ADs, SDs, D-NTC and D-NBC

From: Director

Subject: Permanent Revocation of Delegation of Authority to Sign Final Certificate Documents and Mineral Patents

Program Area: Mineral Patent Applications

Background: On March 2, 1993, the Secretary issued Secretarial Order 3163 which revoked the authority of the Director and delegated subordinate Bureau officials to sign mineral patents or to sign the mineral entry final certificates, first and second half. On December 16, 1996, the Secretary made this provision permanent by revision to the Departmental Manual at 209 DM 7. By virtue of 209 DM 7, the Secretary has reserved to himself personally the authority to sign the first and second halves of the mineral entry final certificates, and the actual mineral patent. No other person is delegated this authority.

Form 3830-2 UNITED STATES DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT (February 2003) FORM APPROVED OMB NO. 1004-0114 Expires: November 30, 2003 MAINTENANCE FEE WAIVER CERTIFICATION SEE INSTRUCTIONS ON NEXT PAGE 1. This small miner waiver is filed for the assessment year beginning at noon on September 1, and ending at noon on September 1, 2. The undersigned and all related parties owned ten or fewer mining claims, mill, or tunnel sites located and maintained on Federal lands in the United States of America on September 1, 3. The undersigned have performed the assessment work required by law for each mining claim listed prior to filing this waiver and understand that by filing this form; an affidavit of assessment work must be recorded by the December 30th following the filing of this waiver. 4. The undersigned understand that if the assessment work obligation has not yet come due under 30 U.S.C. 28 (for those claims in their first assessment year only); a notice of intent to hold reciting this condition must be recorded by the December 30th following the filing of this waiver. 5. The undersigned understand that mill and tunnel sites may also be listed upon this waiver and be waived from payment of the maintenance fee; and that a notice of intent to hold for these sites is required to be recorded by the December 30th immediately following the filing of this waiver. 6. The undersigned understand and acknowledge that pursuant to 43 U.S.C. 1212 and 18 U.S.C. 1001; the filing or recording of a false, fictitious, or fraudulent document with the Bureau of Land Management may result in a fine of up to $250,000, a prison term not to exceed five years, or both. 7. The mining claims, mill or tunnel sites for which this waiver from payment of the maintenance fees is requested are: The owner(s) (claimants) of the above mining claims and sites are: (Owner's Signature)

(Owner's Name - Please Print) (Street or P.O. Box) (State) (Zip Code) (City) (Owner's Signature) (Owner's Name - Please Print) (Street or P.O. Box) (State) (Zip Code) (City) (Owner's Name - Please Print) (Owner's Signature) (Street or P.O. Box) (Zip Code) (State) (City) (Continued on next page) CLAIM OR SITE NAME BLM RECORDATION SERIAL NUMBER 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. . . (Owner's Signature) (Owner's Name - Please Print) (Street or P.O. Box) (City) (State) (Zip Code) (Owner's Name - Please Print) (Owner's Signature) (Street or P.O. Box) (Zip Code) (City) (State) (Owner's Name - Please Print) (Owner's Signature) (Zip Code) (Street or P.O. Box) (State) (City) (Owner's Name - Please Print) (Owner's Signature) (Zip Code) (State) (Street or P.O. Box) (City) INSTRUCTIONS 7. This form must be filed no later than September 1st for the upcoming assessment year in the BLM State Office where the mining claims or sites are recorded, or the waiver cannot be granted by the BLM. (Example: to obtain a waiver for the assessment year 2000, which begins at noon on September 1, 1999, you must qualify for and file for a waiver no later than September 1, 1999 in the proper BLM State Office). 8. For all mining claims which require assessment work, you must record an affidavit of labor on or before the December 30th immediately following the filing of this waiver. For all other mining claims or sites waived, you must record a notice of intent to hold on or before the December 30th immediately following the filing of this waiver. 9. Mill and tunnel sites may also be listed upon this waiver and be waived from payment of the maintenance fee. A notice of intent to hold for these sites is required to be filed by the December 30th following the filing of this waiver. NOTICE/BURDEN HOURS STATEMENT The Paperwork Reduction Act of 1995 requires us to inform you that: The Privacy Act of 1974 and the regulations in 43 CFR 2.48(d) provide that you be furnished the following information in connection with the information required by this certification

of waiver from rental fees. This information is being collected to allow the BLM to determine if you qualify for a waiver from the payment of $100 per mining claim or site maintenance fee established in 30 U.S.C. 28f and the implementing regulations at 43 CFR 3830. A response to this request is required in accordance with the statute to obtain your benefit. AUTHORITY: 30 U.S.C. 28-28k; 43 U.S.C. 1201, 1457, 1740, and 1744; and 43 CFR 3830. PRINCIPLE PURPOSE: This information is to be used to verify that the owner(s) (claimants) of a mining claim has complied with 30 U.S.C. 28f and is entitled to perform assessment work in lieu of paying the maintenance fee for the mining claims listed on this form. BLM would like you to know that you do not have to respond to this, or any other, Federal agency-sponsored information collection unless it displays a currently valid OMB control number. Public reporting burden for this form is estimated to average 8 minutes (0.133 hours) per response, including time to review instructions, gathering and ROUTINE USE: (1) Adjudication of the claimant(s) certification of waiver from paying the maintenance fee otherwise required by 30 U.S.C. 28f. (2) Disclosure maintaining data, and completing and reviewing the form. Direct comments may be made to appropriate Federal agencies when location is made within the regarding this burden estimate, or any other aspect of this form, to the U.S. agency's geographic area of responsibility. (3) Information from the record and/or the record will be transferred to the appropriate Federal, State, or local agency, or a member of the public in response to a specific request for pertinent information. (4) Information may also be provided to the Department of Justice or in a proceeding before a court or adjudicative body; or to Federal, State, local or foreign agencies when needed for enforcement of civil or criminal codes or applicable regulations concerning title rights upon the public land. Department of the Interior, Bureau of Land Management

(1004-0114), Bureau Information Collection Clearance Officer (WO-630), Mail Stop 401 LS, 1849 C St., N.W., Washington, D.C. 20240. FOR OFFICIAL USE ONLY EFFECT OF NOT PROVIDING INFORMATION: Disclosure of this information is required by 30 U.S.C. 28f and 43 CFR Part 3830 for those qualified claimants wishing to take the small miner waiver allowed. Failure to supply the information required in this form to support the claimants certification of waiver from payment of the otherwise required maintenance fees will result in the waiver being disallowed and the mining claims subject to forfeiture by BLM under 30 U.S.C. 28i. BLM Form 3830-2, Page 2 This waiver form must be signed by all the claimants or their designated agent, in original form. If an agent is designated, a notarized designation of agent, signed by all of the claimants with proper address given, must be submitted with this waiver. 6. All owners of the mining claims, mill sites, and tunnel sites and their addresses must be given. 5. All claim and site names and Bureau of Land Management (BLM) serial numbers must be listed for the mining claims, mill sites, and tunnel sites for which the waiver is sought. 4. 3. The claimant(s) must fill in the date in paragraph 2 for the beginning of the assessment year for which this waiver is sought. The claimant(s) must fill in the dates in paragraph 1 for the beginning and ending of the assessment year for which this waiver is sought. 2. This certification is made under the provisions of § 1744 of Title 43 and § 28- 28k of Title 30 of the United States Code; and the regulations thereunder (43 CFR Part 3830). 1.

APPENDIX E

Miscellaneous

Harlow Corporation
Petroleum Exploration • Drilling • Production

August 4,1993

United States Department of the Interior
Bureau of Land Management
Alaska State Office
222 W. 7th Avenue #13
Anchorage, Alaska 99513-7599

We hereby enclose our check in the amount of $400.00 to pay the $100.00 maintenance fee per claim for the September 1, 1994 thru August 31, 1995 year in lieu of assessment work.

This is for the following claims:

Name of Claims	BLM Serial No.	Book	Page	File Date
Dave's Dream	AA0050219	10	98	4-20-83
Dave's Dream #2	AA051621	18	366	8-26-83
Dave's Dream #3	AA051622	18	367	8-26-83
Dave's Dream #4	AA051623	18	368	8-26-83

Said claims are located in Sections 14 and 58 South, Range 82 East, Copper River Meridian, Petersburg Recording District, State of Alaska.

We qualify as a claimant who owns 10 or fewer claims and even though we have done assessment work during the 1993-94 filing years we have not made a filing for a waiver of rental fees or maintenance fees.

If there is a form that we should be using to make our maintenance fee payments we would appreciate receiving the forms for future filings.

If there is any other requirement in terms of filing or forms that we need to be filing with regard to maintaining our claims, we would appreciate your advising us of any such requirement.

Sincerely,

THE HARLOW CORPORATION

W. V. Harlow, Jr.

WVH: ab
Enc.
Certified Mail #P 651 987 353

Harlow Corporation
Petroleum Exploration • Drilling • Production

July 28, 1994

United States Department of the Interior
Bureau of Land Management
Alaska State Office
222 W. 7th Avenue #13
Anchorage, Alaska 99513-7599

Gentlemen:

We hereby enclose our check in the amount of $400.00 to pay the $100.00 maintenance fee per claim for the September 1, 1994 thru August 31, 1995 year in lieu of assessment work.

This is for the following claims:

Name of Claims	BLM Serial No.	Book	Page	File Date
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Dave's Dream #2	AA051621	18	366	8-26-83
Dave's Dream #3	AA051622	18	36	8-26-83
Dave's Dream #4	AA051623	18	368	8-26-83

Said claims are located in Sections 14 and 58 South, Range 82 East, Copper River Meridian, Petersburg Recording District, State of Alaska.

We qualify as a claimant who owns 10 or fewer claims and even though we have done assessment work during the 1993-94 filing years we have not made a filing for a waiver of rental fees or maintenance fees.

If there is a form that we should be using to make our maintenance fee payments we would appreciate receiving the forms for future filings.

If there is any other requirement in terms of filing or forms that we need to be filing with regard to maintaining our claims, we would appreciate your advising us of any such requirement.

Sincerely,

THE HARLOW CORPORATION

W. V. Harlow, Jr.

WVH: ab
Certified Mail #P651 987 370

Attention Miners:

A new law changes assessment work requirements for the next 2 years. Our preliminary interpretation is:

1. You must still file your 1992 assessment work with BLM by December 30, 1992.

2. Locations made on or after October 6, 1992, must pay a new $100 rental fee and existing $10 service fee charge at recording for the 1993 assessment year, and rental fee for the 1993 assessment year is due on or before August 31, 1993.

3. Locations made on or before October 5, 1992, pay $200 rental fee on or before August 31 1993.

4. You may qualify for an exemption if you own 10 claims or less and meet certain production or exploration criteria.

BLM will soon publish proposed rules to implement the new law. Your comments on the proposed rule will be appreciated. Contact the BLM Alaska State Office, Branch of Mineral Law, at (907) 271-3343

Table 3-19. Recordation of mining claims, Public Law 94-579, from October 21, 1976, through fiscal year 1996

Administrative State ***	Active claims at end of fiscal year ***
Total	306,520

***

Sources: BLM's automated mining claims recordation systems for the lower 48 and Alaska; BLM State Office records and working files.

Table 3-22 ADJUDICATION OF MINING CLAIMS, PUBLIC LAW 94-579, FROM OCTOBER 21, 1976, THROUGH FISCAL YEAR 2001

***

***	Active Claims At Beginning of Fiscal Year /a/ ***	Claims Closed /b/ ***	Claims Held Under FHFC/c/ ***	Active Claims At Year End ***
Total	*** 228,557	59,119	1,933	207,757

Table 3-22

***

/a/ Active means that the subject claim or site is in good standing under the recording, maintenance, and assessment work statutes. It does not refer to any potential activity upon the land contained within the claim or site.

/b/ Claims patented, or claims declared forfeit or abandoned and void, or null and void, under Public Laws 94-579, 13-66, or 105-277. On October 21, 1998, Public Law 105-277 (112 Stat. 2681-235) continued a one-time location fee of $25 and an annual maintenance fee of $100 per claim or site in lieu of performance of assessment work. Certain "small miners" and mineral patent applicants were exempted and the fees waived. Failure to pay, qualify as a "small miner," qualify for a waiver, or file necessary documents as required by law or regulation results in statutory abandonment and forfeiture of the affected claim or site (43 CFR 3833.1-6). Claims forfeited or abandoned in one year may be closed out in the following year.

/c/ Claims held under First Half of the Mineral Entry Final
Certificate (FHFC) for a mineral patent application are exempt

from the requirements to perform assessment work or to pay the annual $100 fee (43 CFR 3851.5).
***

Table 53 — Recordation of mining claims, Public Law 94-579, from October 21, 1976, through fiscal year 1993

	Unpatented claims of record	
***	Total as of beginning of fiscal year	Total as of end of fiscal year
	***	
	1,073,645	***
Total		841,271

***

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Roger F. Dierking, OSB 69043
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Attorneys at Law
1500 N.E. Irving, Suite 540
Portland, Oregon 97232
Phone: (503) 231-7765
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HARLOW CORPORATION,)	
a Delaware corporation and)	
All Other Owners of)	
Unpatented Mining Claims)	No. CV'96-903-AS
Similarly Situated,)	
Plaintiff,)	COMPLAINT FOR
v.)	DECLARATORY
JUDGMENT	
)	AND FOR INJUNCTIVE
BRUCE BABBITT,)	RELIEF (CHALLENGING
Secretary of the Interior,)	THE VALIDITY OF
CERTAIN	
MICHAEL DOMBECK,)	MINING REGULATIONS
Director, Bureau of Land)	AND STATUTES)
Management,)	
Defendants.)	
_____)	

***

10. In 1987, the Forest Service examined and took samples from the discoveries made on the Dave's Dream mining claims. The Forest Service delayed and withheld action to test the samples and complete a report of mineral

examination required by Harlow to commence plans for intensive mining operations and patenting the mining claims pursuant to 30 U.S.C. §§ 29 and 35.
***

12. Prior owners had expended money estimated in tens of thousands of dollars in developing the claims before Harlow acquired the claims in 1988. Thereafter Harlow expended $70,000 for working and holding the claims while waiting for Forest Service validation of the claims. During the long wait for validation of the mining claims, Harlow was unable to proceed with acquiring venture capital to commence developing the claims for production.
***

14. On January 4, 1993, Harlow received BLM's notice informing Harlow of the requirements to pay rental fees and fee exemption filing requirements on or before August 31, 1993 and informed Harlow of the forfeiture provisions of 30 U.S.C. § 28i for failure to file. (Exh 1).
***

17. On August 4, 1993, Harlow paid $200 in rental fees per claim, in accordance with 30 U.S.C. § 28f and 43 CFR § 3833.1-5 and requested information to understand mining claim instrument and maintenance fee requirements. (Exh 2).
***

19. On May 3, 1994, Harlow filed a plan of operations with the Forest Service pursuant to Forest Service regulation 36 CFR § 228 to commence intensive mineral development of the claims.
***

27. During August and early September 1995, Harlow expended $17,000 to perform extensive work, including but not limited to the excavation of pits at the site to expose discoveries for the Forest Service to take test samples.
***

32. On December 27, 1995, Harlow timely recorded annual mining claim instruments with BLM pursuant to 43 U.S.C. § 1744(a) and 43 CFR § 3833.2, indicating additional intention to work and hold the mining claims during the 1995-1996 assessment year.

33. When preparing to file the 1995 annual assessment instruments with BLM under 43 U.S.C. § 1744(a) and § 43 CFR 3833, Harlow learned of the requirement of 43 CFR 3833.1-5 for the payment of maintenance fees due on or before August 31, 1995.

34. On December 27, 1995, based on having met the certification requirements for waiver of maintenance fees, Harlow prepared a certification for waiver of fees and mailed it to the BLM Anchorage State Office along with the 1995 annual instrument recordation requirement. (Exh 6).

***